FILE COPY

Supreme Court, U. S.
FILED
MAR 15 1973
MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

No. 72-842

JAMES BRADLEY,

PETITIONER,

-VS-

STATE OF FLORIDA,

RESPONDENT.

RESPONSE TO PETITION FOR WRIT OF CERTIORARI

ROBERT L. SHEVIN
Attorney General

RAYMOND L. MARKY
Assistant Attorney General
The Capitol
Tallahassee, Florida 32304

ATTORNEYS FOR RESPONDENT

TOPICAL INDEX

	Page
OPINION BELOW	1
STATEMENT OF THE CASE	1
JURISDICTION	3
STATUTES INVOLVED	3
REASONS WHY THE WRIT SHOULD NOT BE GRANTED	4
CONCLUSION	10
CERTIFICATE OF SERVICE	11

TABLE OF CITATIONS

	Page
Bradley v. State, 265 So.2d 532	1
Cardinale v. Louisiana, 394 U.S. 437 (1969)	5,7
Hardy v. Blount, Fla. 1972, 261 So.2d 172	5
Hamilton v. Alabama, 368 U.S. 52 (1961)	8
Kerr v. Dutton, 395 F.2d 79 (5th Cir. 1968)	8
King v. Dutton, 368 F.2d 57 (5th Cir. 1966)	8
Lem Woon v. Oregon, 229 U.S. 586 (1914)	8,9
Maxwell v. Blount, Fla.App.1st 1971, 250 So.2d 657	5
McCoy v. Wainwright, 396 F.2d 818 (5th Cir. 1968)	8
Murphy v. Beto, 416 F.2d 98 (5th Cir. 1969)	8
Pugh v. Rainwater, S.D.Fla. 1972, 332 F.Supp. 1107	8

TABLE OF CITATIONS (Cont'd)

	Page
Scarbrough v. Dutton, 393 F.2d 6 (5th Cir. 1968)	8
State v. Hernandez, Fla. 1968, 217 So.2d 109	9
State ex rel. Shailer v. Booker, Fla.App.4th 1970, 241 So.2d 720	5
Worts v. Dutton, 393 F.2d 341 (5th Cir. 1968)	8

OTHER AUTHORITIES

	Page
Section 901.06, Florida Statutes	1,2
Section 901.23, F.S.	2
Section 907.45, F.S.	2
Section 907.045, F.S.	3
Rule 1.191, Fla.R.Cr.P.	2
Rule 1.122(a)(4), Fla.R.Cr.P.	1,2
Rule 3.14(a), Fla. App. R.	3
Rule 3.191, Fla.R.Cr.P.	2
28 U.S.C., § 1257(3)	3

IN THE UNITED STATES SUPREME COURT

No. 72-842

JAMES BRADLEY,

Petitioner,

-vs-

STATE OF FLORIDA,

Respondent.

RESPONSE TO PETITION FOR WRIT OF CERTIORARI

OPINION BELOW

The opinion of the District Court of Appeal, First District, affirming the judgment and sentence imposed upon Petitioner is reported in 265 So.2d 532, and the citation of 365 So.2d 532 in the petition is undoubtedly a typographical error.

STATEMENT OF THE CASE

On January 28, 1971, a direct information was filed against Petitioner charging him with buying, receiving or concealing stolen property, to-wit: a 1970 Triumph motorcycle. On February 9, 1971, allegedly pursuant to Section 901.06, Florida Statutes, and Rule 1.122 (a)(4), Fla.R.Cr.P., Petitioner filed a Motion for Preliminary Hearing. This motion was denied by the trial judge be-

cause Petitioner was not in custody and had not been in custody at anytime for a period exceeding thirty days.

Trial was held on March 31, 1971, after Petitioner filed a demand for a speedy trial pursuant to Rule 1.191 (Now Rule 3.191, Fla.R.Cr.P.) which required that he be tried within 90 days from the date that he was taken into custody or the information filed. On April 1, 1971, Petitioner was found guilty as charged and on June 11, 1971, judgment and sentence was imposed.

A timely appeal was instituted to the District Court of Appeal, First District, and Petitioner asserted he was improperly denied a preliminary hearing guaranteed to him by Sections 901.06 and 901.23, Florida Statutes, and Rule 1.122, Fla.R. Cr.P., now repealed by rules recently adopted by the Florida Supreme Court. None of the cases cited in the petition nor the constitutional issues now attempted to be raised were raised by Petitioner. Respondent herein answered this contention by directing the District Court's attention to the fact that under existing state law, Section 901.23 did not apply because Petitioner was not arrested with or without warrant, but was arrested on a capias issued pursuant to a direct information and Section 907.45 applied. Section 907.45 provides that a preliminary hearing must be held only if the defendant is "...confined for thirty days after his arrest without trial..." The District Court of Appeal, consistent with state court decisions,

BLEED THROUGH POOR COPY

held the trial judge did not err in denying the Petitioner's Motion for Preliminary Hearing and affirmed the judgment and sentence on August 17, 1972.

Subsequently, Petitioner retained new counsel——counsel who filed the petition herein——and on October 5, 1972, filed a Petition for Rehearing allegedly pursuant to Rule 3.14(a), Fla. App. Rules. Respondent opposed the Petition for Rehearing on the grounds that under Rule 3.14(a), the petition was beyond the 15 days allowed by law and the decision became final on September 1, 1972. The District Court of Appeal, First District denied said petition on October 17, 1972. On December 8, 1972, Petitioner filed in this Court a Petition for Writ of Certiorari to the District Court of Appeal, First District.

JURISDICTION

The jurisdiction of this Court is asserted under 28 U.S.C., § 1257(3).

STATUTES INVOLVED

Section 907.045, Florida Statutes, provides as follows:

> "A defendant who is in custody when an indictment, information, or affidavit on which he can be tried is filed may apply for a writ of habeas corpus attacking the indictment, information, or

affidavit or he may move to dismiss the indictment, information, or affidavit. A defendant who has been confined for thirty days after his arrest without trial shall be allowed a preliminary hearing."

REASONS WHY THE WRIT SHOULD NOT BE GRANTED

I

It affimatively appears that the decision of the District Court became final on September 1, 1972, as the petition for rehearing was not filed within the fifteen days required by Rule 3.14(a), Florida Appellate Rules. Since that is the case, the time within which a timely Petition for Writ of Certiorari could be filed in this Court——in the absence of an extension of time from the Court——expired on November 30, 1972, and the petition was not filed until December 8, 1972. Accordingly, the petition filed herein is untimely and the same should not be entertained.

II

Even assuming the Court determines it has the authority to consider the petition notwithstanding the deficiency noted under Part I, the petition should be rejected because the issues tendered to this Court were not presented, advanced or decided by the District Court

of Appeal. Not one single case cited by Petitioner's new attorney was presented to the District Court of Appeal! Indeed, original counsel relied upon state statutes and rules together with the case of State ex rel. Shailer v. Booher, Fla.App. 4th 1970, 241 So.2d 720, distinguished by the District Court of Appeal in Maxwell v. Blount, Fla.App.1st 1971, 250 So.2d 657 approved in Hardy v. Blount, Fla. 1972, 261 So.2d 172.

This Court in Cardinale v. Louisiana, 394 U.S. 437 (1969) clearly established that under such circumstances it was without jurisdiction to entertain the merits of the federal claims first raised on appeal in this Court. The Court clearly and unequivocally held:

> "Although certiorari was granted to consider this question, the fact emerged in oral argument that the sole federal question argued here had never been raised, preserved, or passed upon in the state courts below. It was very early established that the Court will not decide federal constitutional issues raised here for the first time on review of state court decisions. In Crowell v. Randell, 10 Pet 368, 9 L.Ed 458 (1836), Justice Story reviewed the earlier cases commencing with Owings v Norwood's Lessee, 5 Cranch 344, 3 L Ed 120 (1809), and came to the conclusion that the Judiciary Act of 1789, c 20,

§25, 1 Stat. 85, vested this Court with no jurisdiction unless a federal question was raised and decided in the state court below. 'If both of these do not appear on the record, the appellate jurisdiction fails.' 10 Pet 368, 391, 9 L Ed 458, 467. The Court has consistently refused to decide federal constitutional issues raised here for the first time on review of state court decisions both before the Crowell opinion, Miller v. Nicholls, 4 Wheat 311, 315, 4 L Ed 578, 579 (1819), and since, e. g. Safeway Stores, Inc. v. Oklahoma Retail Grocers Assn., Inc., 360 US 334, 342, n. 7, 3 L Ed 2d 1280, 1286, 79 S Ct 1196 (1959); State Farm Mutual Automobile Ins. Co v. Duel, 324 US 154, 160-163, 89 L Ed 812, 817-819, 65 S Ct 573 (1945); McGoldrick v. Compagnie Generale Transatlantique, 309 US 430, 434-435, 84 L Ed 849, 851-852, 60 S Ct 670 (1940); Whitney v. California, 274 US 357, 362-363, 71 L Ed 1095, 1100-1101, 47 S Ct 641 (1927); Dewey v Des Moines, 173 US 193, 197-201, 43 L Ed 665, 667-668, 19 S Ct 379 (1899); Murdock v. City of Memphis, 20 Wall 590, 22 L Ed 429 (1875).

"In addition to the question of jurisdiction arising under the statute controlling our power to review final judgments of state

courts, 28 USC §1257, there are sound reasons for this. Questions not raised below are those on which the record is very likely to be inadequate, since it certainly was not compiled with those questions in mind. And in a federal system it is important that state courts be given the first opportunity to consider the applicability of state statutes in light of constitutional challenge, since the statutes may be construed in a way which saves their constitutionality. Or the issue may be blocked by an adequate state ground. Even though States are not free to avoid constitutional issues on inadequate state grounds, O'Connor v Ohio, 385 US 92, 17 L Ed 2d 189, 87 S Ct 252 (1966), they should be given the first opportunity to consider them."

For the reasons state above and on the authority of Cardinale v. Louisiana, this Court is without jurisdiction to consider the federal question tendered and/or should not be considered until the matter is properly presented to and passed upon by an appropriate state court.

III

Alternatively, Respondent urges this Court to decline the petition filed herein on the grounds that no substantial federal question is presented by the facts and circumstances of this case.

As has heretofore been noted, the order denying Petitioner's Motion for Preliminary Hearing was predicated on the fact that he was not confined and had not been for any period exceeding thirty days. Accordingly, this case is distinguishable from Pugh v. Rainwater, S.D.Fla. 1972, 332 F.Supp. 1107, 1112, wherein the court was "asked to determine the validity of a present confinement."

In Pugh the district judge noted that this very Court in Lem Woon v. Oregon, 229 U.S. 586 (1914) held an Oregon defendant who was accused by sworn complaint before a committing magistrate had no right to an examination as a condition precedent to the filing of an information by the district attorney, and that the Court of Appeals, Fifth Circuit, has repeatedly held there is no due process right to a preliminary hearing and that "[T]he failure to hold a preliminary hearing, without more, does not amount to a violation of constitutional rights which would vitiate the subsequent conviction." Scarbrough v. Dutton, 393 F.2d 6 (5th Cir. 1968). See also: Murphy v. Beto, 416 F.2d 98 (5th Cir. 1969); McCoy v. Wainwright, 396 F.2d 818 (5th Cir 1968); King v. Dutton, 368 F.2d 57 (5th Cir. 1966); Worts v. Dutton, 393 F.2d 341 (5th Cir. 1968); Kerr v. Dutton, 395 F.2d 79 (5th Cir. 1968); cf. Hamilton v. Alabama, 368 U.S. 52 (1961).

Unlike Pugh, Petitioner did not seek habeas corpus or file an action contesting his existing condition. Rather he raised the matter subsequent to an other-

BLEED THROUGH POOR COPY

wise valid conviction and, whether he was entitled to a preliminary hearing or not, has made no showing whatsoever that the denial of said hearing adversely affected the validity thereof.

Two distinct issues are raised when one questions the authority to hold a person confined without a reasonably prompt hearing to determine if probable cause exists and one challenges the power of the state to prosecute pursuant to a direct information without there first having been a preliminary hearing. The Petitioner is only in a position to raise the latter issue and no substantial federal question is presented with regard thereto. Lem Woon v. Oregon, supra; State v. Hernandez, Fla. 1968, 217 So.2d 109. He is in no position to raise the former and apparently never has been.

CONCLUSION

For the reasons stated hereinabove, Petitioner has not been deprived of due process of law which would result in a vacation of his judgment and sentence, and this Court in the exercise of its discretionary authority should decline to review the same. The petition filed herein should be denied.

Respectfully submitted,

ROBERT L. SHEVIN
Attorney General

RAYMOND L. MARKY
Assistant Attorney General
The Capitol
Tallahassee, Florida 32304

Counsel for Respondent

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Response to Petition for Writ of Certiorari has been forwarded to Honorable Dan R. Warren, Post Office Box 2265, Daytona Beach, Florida 32015, via U. S. Mail, this ____ day of March, 1973.

Raymond L. Marky
Assistant Attorney General